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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 187

ALBERT W. NEWSOM et al.,
Petitioners,

vs.

E. I. duPONT de NEMOURS & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Page

Counter-statement of facts 2

Reply to assignments of error and argument 4

Opinions of Courts of Appeal claimed to be in conflict with opinion in instant case 5

Petitioners' claims are not excepted from the provisions of the Portal-to-Portal Act of 1947 by Section 2 thereof 7

Opinion in instant case consistent with other opinions 10

Conclusion 18

Cases Cited.

Atallah v. B. H. Hubbert & Son, Inc. (C. A. 4), 168 F. 2d 993, certiorari denied under style of Cingrigrani v. B. H. Hubbert & Son, Inc., 335 U. S. 868, 93 L. Ed. ..., 69 S. Ct. 138 16

Battaglia v. General Motors Corp. (C. A. 2), 169 F. 2d 254, certiorari denied 335 U. S. 887, 93 L. Ed. ..., 69 S. Ct. 236 16

Battery Workers' Union v. Electric Storage Battery Co., U. S. D. C., East. Dist., Pa. (1948) 12

Central Missouri Telephone Co. v. Conwell (C. A. 8), 170 F. 2d 641 5

Colvard v. Southern Wood Preserving Company, D. C. East. Dist. Tenn., 74 F. Supp. 804 11

Darr v. Mutual Life Ins. Co. of New York (C. A. 2), 169 F. 2d 262, certiorari denied 335 U. S. 871, 93 L. Ed. ..., 69 S. Ct. 166 16

Fisch v. General Motors Corp., certiorari denied 335 U. S. 902, 93 L. Ed. ..., 69 S. Ct. 405 16

Frank et al. v. Wilson Co., Inc. (C. A. 7), 172 F. 2d 712 6

Hays v. Hercules Powder Co., U. S. D. C., West Dist., Mo. (1947) 12
Joshua Hendy Corporation v. Mills (C. A. 9), 169 F. 2d 898 6
Lasater v. Hercules Powder Co. (C. A. 6), 171 F. 2d 263 ..... 10, 14
Local 626, U. A. W., v. General Motors Corp., D. C. Conn., 76 Fed. Supp. 593 ..... 11, 14
Millet v. Bethlehem-Hingham Shipyard, U. S. D. C., Mass. (1948) 12
Mitchell v. Boston Sausage Co., U. S. D. C., Mass. (1948) 12
Potter v. Kaiser Co. and Role v. Neils Lumber Co. (C. A. 9), 171 F. 2d 705 16
Rogers Cartage Co. v. Reynolds (C. A. 6), 166 F. 2d 317 16
Sadler v. Dickey Clay Mfg. Co., D. C. West. Mo., 78 F. Supp. 616 11
Seese v. Bethlehem Steel Company (C. A. 4), 168 F. 2d 58 13

Statutes Cited.

Fair Labor Standards Act, Section 7 5
Portal-to-Portal Act of 1947, Section 2 (a) (1) and (2) 4, 5, 7, 8, 9, 10

Miscellaneous Citations.

Federal Register of November 18, 1947, 29 CFR, 1947 Supp. 790 13
Interpretative Bulletin, Wage and Hour Administrator, Sec. 790.9 (c) 12
Labor Relations Reporter, WHM 7:151 13

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Pursuant to the Rules of the Supreme Court of the United States (Rule 38) respondent herewith submits its brief in opposition to petition for certiorari as prayed for by petitioners.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor (Rule 38, par. 5).

The sole reason stated in the petition for granting the writ in this case is that appearing on page 2, as follows:

> "The opinion of the Court of Appeals for the Sixth Circuit is in conflict with the opinion of the Court of Appeals for the Eighth Circuit in the case of Central Missouri Telephone v. Conwell, 170 F. 2d 641, and in conflict with the decision of the Court of Appeals for the Seventh Circuit in the case of Frank et al. v. Wilson Co., Inc., 172 F. 2d 712, and in conflict with the opinion of the Court of Appeals for the Ninth Circuit in the case of Joshua Hendy Corporation v. Mills, 169 F. 2d 898."

Respondent contends that the opinion of the Court of Appeals for the Sixth Circuit is not in conflict with any opinion of any Court of Appeals as will be pointed out hereinbelow.

Respondent therefore contends that the reason specified in the petition does not exist, and further that no special and important reasons are shown on the record for granting the writ of certiorari in this case.

COUNTER-STATEMENT OF FACTS.

The petition, at page 3, contains the statement:

> "All of the petitioners are hourly rated employees of defendant, and all worked during the time involved in this case under the terms and provisions of contracts entered into by the collective bargaining agent of the employees and the defendant. This contract had, among other provisions, the following two provisions:"
>
> (Here follows quotations from the contracts.)

This statement is inaccurate as a statement of fact.

On page 12 of the Argument it is conceded that there were three written contracts between the defendant and its employees. The first contract was made September 2, 1944, and continued in effect until January 2, 1946.

The second contract between the parties was dated January 2, 1946, and the third contract was dated May 1, 1947.

The complaint was filed in the United States District Court September 16, 1946, and was a class action seeking the relief authorized in the Fair Labor Standards Act (R. pp. 2-6).

Thus, during the time involved in the cause, there were only two collective bargaining contracts in existence, and only the first contained the provision first quoted on page 3 of the petition, as follows:

> "Time and one-half or double time will be paid when required by law or Government Regulation."

On pages 3 and 4 of the petition there are statements purporting to be statements of fact which are actually only allegations of the complaint, which were denied by this respondent in its answers to the original complaint and the amended complaint (R. pp. 20-23, 35-43).

This is stated in order to avoid any admission on the part of this respondent that the statements in the petition, made as statements of fact, are true, although, as stated by the Court of Appeals in its opinion, since the case was decided on motion to dismiss, the Court will assume the existence of the facts well pleaded in the complaint (R. p. 63).

REPLY TO ASSIGNMENTS OF ERROR AND ARGUMENT.

I.

Petitioners' Assignment of Error No. 1 is as follows:

> "The Court of Appeals committed error in holding that the claims of the petitioners are not within the exception contained in Section 2 of the Portal-to-Portal Act of 1947. The petitioners' claims, based upon the Fair Labor Standards Act, were excluded from the coverage of the Portal-to-Portal Act of 1947, because they are based upon an express provision of a written contract entered into by the collective bargaining agent of the petitioners and the defendant."
>
> (Pet. p. 6.)

This presents the question:

> "Are the petitioners' claims within the exception contained in section 2 of the Portal-to-Portal Act of 1947?"
>
> (Pet. p. 9.)

The District Court and the Court of Appeals answered "No" to this question, the opinion of the Court of Appeals (Sixth Circuit) being reported in 173 F. 2d 856, and appearing on pages 60-66 of the Record.

Respondent contends that in this opinion the Court of Appeals gave careful consideration to the contention made by this assignment of error that petitioners' claims are within the exception contained in Section 2 of the Portal-to-Portal Act of 1947.

The Court held that the provision of the contract of September 2, 1944, that time and a half or double time should

be paid when required by law or government regulation, did not meet the requirements of the exception of the Portal-to-Portal Act contained in Section 2 (a) (1) and (2) because such provision did not refer to and specify the activities for which compensation was to be made.

The Court further held that Section 7 of the Fair Labor Standards Act makes no reference to pay for activities such as are here involved, and while the provisions of the Fair Labor Standards Act became a part of the express contract under the bargaining agreement of September 2, 1944, this incorporation of the statute by references does not add an express provision covering the particular activities, and therefore the exception of the Portal-to-Portal Act does not apply.

The opinion contains the following language:

> "There being no allegation or proof of the existence of an express contract or custom to pay for the activities described in the complaint, they are barred."
>
> (R. p. 65.)

Respondent contends that the opinion of the Court of Appeals is not in conflict with any of the opinions of Courts of Appeals mentioned on page 2 of the petition.

Opinions of Courts of Appeal Claimed to be in Conflict With Opinion in Instant Case.

(1) The first opinion mentioned as conflicting is in the case of Central Missouri Telephone Co. v. Conwell (C. A. 8), 170 F. 2d 641.

In this case the facts were that telephone operators, working the night shift, were permitted to sleep in between calls, and although they were on the job during all of an

eleven hour shift, they were paid for only eight hours work.

The Court held that it was not necessary to the recovery of compensation for time actually devoted to normal work for which the employees were employed, to plead an express written contract or unwritten contract, or practice or custom. The Court stated:

> "We conclude that plaintiffs were on duty, performing compensable activities, during the entire eleven hours they spent at defendant's exchanges during the period involved in this action (citing cases)."

(2) The second opinion mentioned as being in conflict with the opinion in the instant case is Frank et al v. Wilson Co., Inc. (C. A. 7), 172 F. 2d 712.

In this case the Court of Appeals found that the employees were required to commence their usual activities five minutes before the time the employer computed the start of their working day for payroll purposes.

Thus, the activities held in this case to be compensable were the same activities for which the employees were engaged.

Also, it should be noted that the Court of Appeals held the five-minute period to be within the de minimus rule and remanded the cause to the District Court with directions to dismiss the complaint.

(3) The third case mentioned as being in conflict with the opinion in the instant case is that of Joshua Hendy Corporation v. Mills (C. A. 9), 169 F. 2d 898.

In its opinion in this case the Court of Appeals found the facts to be that plaintiff worked an eight and one-half hour day which included a thirty minute lunch period.

He was paid for eight hours only, and the Court held that this employee was engaged in his regular work during his lunch hour, and, therefore, was entitled to recover for overtime.

It is clear that in all three of the opinions mentioned as being in conflict with the opinion of the Court of Appeals in the instant case, the facts found by the Courts supported the judicial conclusion that the employees were engaged in the activities for which they had been employed during time not paid for by the employer.

Such cases are clearly distinguishable from the instant case.

Here, the Court finds that the activities for which compensation is sought are preliminary and postliminary to productive work for which the petitioners were employed (R. p. 60).

Petitioners' Claims Are Not Excepted From the Provisions of the Portal-to-Portal Act of 1947 by Section 2 Thereof.

Section 2 of the Portal-to-Portal Act of 1947 [29 U. S. C., Sec. 252 (a) (1) and (2)], is as follows:

> "**Sec. 2. Relief from Certain Existing Claims under the Fair Labor Standards Act of 1938, as Amended, the Walsh-Healey Act, and the Bacon-Davis Act.—**
>
> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of

any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

The decision of the Court of Appeals embodied two important holdings, namely: (a) that the exception of the Portal-to-Portal Act contained in Section 2 (a) (1) and (2) thereof, requires a contract which refers to and specifies the activities for which compensation is claimed; and (b) that the incorporation of the Fair Labor Standards Act into a contract by reference, does not meet the requirements of the exception in the absence of a provision expressly referring to and specifying the activities for which compensation is claimed.

With reference to (a) the opinion contains the following language:

"The exception of the Portal-to-Portal Act [29 U. S. C., Sec. 252 (a) (1) and (2)] does not apply to any and all activities engaged in by employees, but only to such as are expressly compensable under a written or nonwritten contract or custom or practice in effect covering the activity. In order that activities be expressly compensable under this provision they must be specifically described. A contract which does

not refer to and specify the activities for which compensation is to be made does not bring the exception into force. It is undisputed on this record that the parties, in executing the contract of September 2, 1944, did not contemplate that the activities described in the complaint should be paid for. Such activities, at that time and always, prior to the decision in Tennessee Coal, Iron & Rd. Co. v. Muscoda Local No. 123, 321 U. S. 590; Jewell Ridge Coal Corp. v. Local No. 6167, 325 U. S. 161, and Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 696, had been considered as incidental to and included in the productive work and compensated for by the rate of pay on the particular job. The first requisite, then, for the existence of a contract between the parties to pay for these particular activities, namely, a meeting of the minds, was completely lacking. The transactions in controversy fall squarely within the situation described in the findings and declaration of policy of the Congress made in Section 1 (a) (5) of the Portal-to-Portal Act [29 U. S. C., Sec. 251 (a) (5)], namely, that if this recovery is allowed, it will give payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in."

With reference to (b) the opinion contains the following language:

"The Fair Labor Standards Act, although incorporated by reference into the contract, does not fill this gap, for it contains no provision with reference to the activities for which recovery is here sought. It embodies provisions regulating minimum wages and maximum hours of work in industry generally. The Act does not define work or workweek, nor say any-

things as to whether or not preliminary or incidental activities shall be compensable. Section 7, which fixes the maximum hours of a workweek and forbids employment for any time in excess thereof unless time and a half is paid for overtime (29 U. S. C., Sec. 207), makes no reference to pay for activities such as are here involved. While the provisions of the Fair Labor Standards Act became part of the express contract under the bargaining agreement of September 2, 1944, this incorporation of the statute by reference does not add an express provision covering the particular activities, and therefore the exception of the Portal-to-Portal Act does not apply."

Opinion in Instant Case Consistent With Other Opinions.

In its holding that the exception of the Portal-to-Portal Act requires a contract which refers to and specifies the activities for which compensation is claimed, the opinion of the Court of Appeals in the instant case is consistent with the following:

Lasater v. Hercules Powder Co. (C. A. 6), 171 F. 2d 263, wherein the Court uses the following language:

"The proof disclosed no express contract, written or nonwritten, and no custom or practice for payment of compensation for overtime which would bring appellants' claim within the exception set forth in the Portal-to-Portal Act. Since the activities of the employees had not been previously compensable by virtue of contract, custom or practice, Section 2 of the Portal-to-Portal Act precludes all liability of the employer for payment of such overtime compensation."

Sadler v. Dickey Clay Mfg. Co., D. C. West. Mo., 78 F. Supp. 616, wherein the opinion of the Court contains the following language:

> "We believe that under Section 2 (d), supra, of the Portal-to-Portal Act of 1947, plaintiffs, relying upon a contract, must allege the express provision of such contract that would authorize the payment of compensation for the particular activity claimed; . . ."

Local 626, U. A. W. v. General Motors Corp., D. C. Conn., 76 Fed. Supp. 593, wherein the opinion of the Court contains the following language:

> "But this position completely disregards the fact that there is nothing in those complaints to show that either party to the several contracts of employment—and still less, that both parties to each such contract—ever contemplated that the activities in question should be compensable; they do not show that in the consummation of the contract words were used or other manifestations of intention were given which the plaintiffs in fact understood to mean, or reasonably ought to have understood to mean that compensation would be made for the activities now in question."

Colvard v. Southern Wood Preserving Company, D. C. East. Dist. Tenn., 74 F. Supp. 804, wherein the opinion of the Court contains this language:

> "My judgment is that the contract for the payment of overtime, as intended by the Congress in the Portal-to-Portal Act of 1947, must be an express or written contract concerning the particular time for which overtime compensation is sought."

The foregoing are the only decisions on the point which have come to our attention, although there have been nu-

merous unreported decisions to the same effect, among such being:

Millet v. Bethlehem-Hingham Shipyard, U. S. D. C., Mass. (1948);

Mitchell v. Boston Sausage Co., U. S. D. C., Mass. (1948);

Battery Workers' Union v. Electric Storage Battery Co., U. S. D. C., East. Dist., Pa. (1948);

Hays v. Hercules Powder Co., U. S. D. C., West Dist., Mo. (1947).

In addition, we call attention to the Interpretative Bulletin issued by the Wage and Hour Administrator on November 18, 1947, Sec. 790.9 (c), which contains the following language:

"(c) The phrase 'compensable by an express provision of a written or nonwritten contract' in section 4 (b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description. The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a non-written contract since there may well be conflicting recollections as to the exact terms of the agreement. The words 'compensable by an express provision' indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfac-

torily appear from the express terms of the agreement."

Published in Federal Register on November 18, 1947, 29 CFR, 1947 Supp. 790;
Labor Relations Reporter, WHM 7:151.

In its holding that the incorporation of the Fair Labor Standards Act into a contract by reference, does not meet the requirements of the exception in the absence of a provision expressly referring to and specifying the activities for which compensation is claimed, the opinion of the Court of Appeals in the instant case is consistent with the following:

Seese v. Bethlehem Steel Company (C. A. 4), 168 F. 2d 58, wherein the opinion of the Court contains the following language:

"It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the Portal to Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act. As said in Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 435:

"'Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes

of sovereign power is also read into contracts as postulate of the legal order.' "

Local 626, U. A. W., v. General Motors Corp., D. C. Conn., 76 F. Supp. 593, wherein the opinion of the Court contains the following language:

"Thus in effect plaintiffs contend that the provisions of the Fair Labor Standards Act as construed by the Supreme Court of the United States became an inherent part of the contract of employment between the parties which upon performance by the plaintiffs became fully vested and hence beyond the reach of legislative modification. This in my view is the only point in the brief deserving of discussion.

"But this position completely disregards the fact that there is nothing in those complaints to show that either party to the several contracts of employment—and still less, that both parties to each such contract—ever contemplated that the activities in question should be compensable; they do not show that in the consummation of the contract words were used or other manifestations of intention were given which the plaintiffs in fact understood to mean, or reasonably ought to have understood to mean, that compensation would be made for the activities now in question."

Lasater v. Hercules Powder Co. (C. A. 6), 171 F. 2d 263, wherein the opinion of the Court contains the following language:

"With regard to the contention of appellants that the Fair Labor Standards Act should be read into the contract of employment, it was said in Seese v. Bethlehem Steel Co., 168 F. 2d 58, where a similar argument was made, that 'the true situation with re-

spect to claims affected by the Portal-to-Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act.' "

II.

Petitioners' Assignment of Error No. 2 is as follows:

"The Court of Appeals for the Sixth Circuit, in construing the Portal-to-Portal Act of 1947 so as to bar the claims of petitioners, placed a construction upon the Portal-to-Portal Act of 1947 that renders this Act unconstitutional under the Fifth Amendment to the Constitution of the United States."

(Pet. p. 6.)

This presents the question:

"If applied as a bar to petitioners' claims under the Fair Labor Standards Act, is the Portal-to-Portal Act of 1947 unconstitutional?"

(Pet. p. 9.)

The District Court and the Court of Appeals answered "No" to this question.

The opinion of the Court of Appeals contains the following language:

"The constitutionality of the Portal-to-Portal Act has also been considered recently by this court in Rogers Cartage Co. v. Reynolds, 166 Fed. (2d) 317. While different sections of the Act, namely, Sec. 9 and Sec. 11, were there construed the constitutionality of

the Act was attacked upon grounds similar to those relied on herein. An exhaustive consideration of the validity of the Act was given by this court in Fisch v. General Motors Corp., supra, and its constitutionality was sustained. Cf. Seese v. Bethlehem Steel Co., supra. We adhere to our previous decisions, and deem it unnecessary further to discuss this portion of appellants' argument."

(R. p. 66.)

In the case of Fisch v. General Motors Corp., cited by the Court of Appeals, certiorari was denied by the Supreme Court, 335 U. S. 902, 93 L. Ed. ..., 69 S. Ct. 405.

In addition to the cases cited by the Court of Appeals, the opinions in the following cases have upheld the constitutionality of the Portal-to-Portal Act of 1947:

Battaglia v. General Motors Corp. (C. A. 2), 169 F. 2d 254, certiorari denied 335 U. S. 887, 93 L. Ed. ..., 69 S. Ct. 236;

Darr v. Mutual Life Ins. Co. of New York (C. A. 2), 169 F. 2d 262, certiorari denied 335 U. S. 871, 93 L. Ed. ..., 69 S. Ct. 166;

Atallah v. B. H. Hubbert & Son, Inc. (C. A. 4), 168 F. 2d 993, certiorari denied under style of Cingrigrani v. B. H. Hubbert & Son, Inc., 335 U. S. 868, 93 L. Ed. ..., 69 S. Ct. 138;

Rogers Cartage Co. v. Reynolds (C. A. 6), 166 F. 2d 317;

Potter v. Kaiser Co. and Role v. Neils Lumber Co. (C. A. 9), 171 F. 2d 705.

In view of the uniform holding by all the Courts that the Portal-to-Portal Act of 1947 is constitutional, and in view of the further fact that this Court has denied certiorari in

several such cases, we deem it unnecessary further to discuss petitioners' Assignment of Error No. 2.

III.

Petitioners' Assignment of Error No. 3 is as follows:

> "The Court of Appeals for the Sixth Circuit committed error in holding that the petitioners' claims are not valid contract claims for which this action can be maintained in the United States courts."
>
> (Pet. p. 6.)

This presents the question:

> "Are petitioners entitled to a recovery in this case upon their contract with the defendant, irrespective of the Fair Labor Standards Act?"
>
> (Pet. p. 9.)

The District Court and the Court of Appeals answered "No" to this question.

The opinion of the Court of Appeals on this point is as follows:

> ". . . since the individual contracts of the 334 appellants are independent of statute, the relief sought is not common to all. Rule 23 (a) (3), Federal Rules of Civil Procedure. Each appellant has a separate and distinct cause of action, and was required to allege that as to him the matter in controversy exceeds the jurisdictional amount of $3,000. Pinel v. Pinel, 240 U. S. 594, 596; Fisch v. General Motors Corp., 169 Fed. (2d) 266, 274 (C. A. 6). Since such allegations are lacking, the District Court did not err in dismissing the complaint."
>
> (R. p. 66.)

Petitioners contend that Rule 23 (a) (3) of the Federal Rules of Civil Procedure permits a joinder of parties in class actions based on a common question of law or fact.

(Pet. p. 37.)

Respondent contends that Rule 23 (a) (3) does not authorize the joinder of individual causes of action so as to combine the individual claims in order to make up the jurisdictional amount of $3,000.00. The existence of the common question of law or fact would not eliminate the requirement that the jurisdictional amount in controversy exceed $3,000.00. The fact that 334 independent contracts might involve in the aggregate in excess of $3,000.00 would not give to the Federal Courts jurisdiction to hear such independent causes of action, even though consolidation for the purpose of trial might be permitted.

CONCLUSION.

Respondent contends that the petition for certiorari is without merit, and, therefore, should be denied.

Respectfully submitted,

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